STATE OF MICHIGAN

IN THE SUPREME COURT

CYNTHIA HARDY, as Personal Representative
For the Estate of **MARGARET MARIE ROUSH,**
Plaintiff-Appellee,

v.

MSC No. 150882
COA No. 317406
Lower Court No.12-K16830CZ

LAURELS OF CARSON CITY, LLC,
Defendant-Appellant.
_____/

MIEL & CARR, PLC
SCOTT G. MILLARD (P75153)
Attorneys for Plaintiff-Appellee

_____

SULLIVAN, WARD, ASHER & PATTON, P.C.
RONALD S. LEDERMAN (P38199)
JONATHAN M. JAFFA (P23717)
Attorneys for Defendant-Appellant

_____

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

EXHIBITS IN SUPPORT OF RESPONSE

EXHIBIT A – OPINION OF COURT OF APPEALS

MIEL & CARR, PLC
BY: SCOTT G. MILLARD (P75153)
Attorneys for Plaintiff-Appellee
309 S. Lafayette St., Ste 208
PO Box 938
Greenville, MI 48838
(989) 831-5208
scott@mielcarr.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS PROPERLY REVERSE THE TRIAL COURT'S ORDER GRANTING SUMMARY DISPOSITION BECAUSE PLAINTIFF HAD NOT HAD AN OPPORTUNITY TO COMPLETE DISCOVERY AND BECAUSE MCL § 700.5508(2) IS NOT CONTROLLING ON ANY OF THE CLAIMS RAISED BY THE PLAINTIFF?

Plaintiff-Appellee answers "Yes".

Defendant-Appellant answers "No".

The Trial Court answered "No".

The Court of Appeals answered "Yes".

II. CAN THE DEFENDANT RAISE NEW ARGUMENTS THAT IT NEVER RAISED TO THE MICHIGAN COURT OF APPEALS AND THAT ALSO REQUIRE THAT THIS COURT IGNORE RECORD EVIDENCE TO FIND VALIDITY IN THE DEFENDANT-APPELLANT'S ARGUMENTS RAISED FOR THE FIRST TIME IN IT MOTION FOR LEAVE?

Plaintiff-Appellee answers "No".

Defendant-Appellant answers "Yes".

STATEMENT OF FACTS

A. INTRODUCTION

On July 10, 2013 the Circuit Court granted the Defendant-Appellant's Motion for Summary Disposition and dismissed the Plaintiff-Appellee's claims with prejudice without costs. The trial court held that MCL 700.5508(2) was dispositive to Plaintiff-Appellee's claim of False Imprisonment and then dismissed Plaintiff's remaining counts of Intentional Infliction of Emotional Distress, Abuse of Process, and Civil Conspiracy as those counts relied on Plaintiff's claim of False Imprisonment. The Court of Appeals thereafter reversed finding that issues of material fact existed as to all counts and that Plaintiff-Appellee stood a fair chance of establishing these counts through the course of discovery. *Opinion attached hereto as Exhibit A.* Defendant-Appellant then filed its Motion for Leave to Appeal to this Court.

B. SUMMARY OF MATERIAL FACTS

Plaintiff-Appellee inserts its statement of facts verbatim with identical citations to the attachments thereto and the pleadings filed to that time from its Appellee Brief filed with the Court of Appeals:

This action arises out of the willful and intentional conduct by employees of the Laurels of Carson City, LLC (the Facility), wherein its employees involuntarily confined Ms. Roush within the Facility against her repeated demand for discharge because the Facility asserted that it had deemed Ms. Roush "incompetent" and that the Patient Advocate Designation of Robert

Gallagher had been "activated." Def. Answer ¶ 12; ¶ 16; Motion Tr. Pg. 7, Ln. 10-22; Pg. 11, Ln. 1-11. The Facility asserted that Ms. Roush's confinement was justified until Ms. Roush obtained a court order to exercise her fundamental rights. Motion Tr. Pg. 10, Ln. 10-23. The Facility admits that Ms. Roush was conscious of her confinement and her repeated demands for discharge. Motion Tr. Pg. 14, Ln. 2-5.

On October 16, 2012 Ms. Roush admitted herself into the Facility for rehabilitative services following a brief hospitalization. Def. Answer ¶ 9. On October 22, 2012, Dr. Robert Seals signed a standardized form alleging incapacity to participate in medical and financial decisions. To date no documented evidence for this finding has been produced by the Facility. Dr. Srinivasa Madireddy signed the same standardized form on October 24, 2012. Motion Tr. Pg. 6, Ln. 18-25; Pg. 8-9. At all times the goal for Ms. Roush's admittance was to return to her home. Pl. Resp. to Def. Motion, Exhibit G.

On November 1, 2012 Ms. Roush demanded discharge from the Facility. The staff and its medical director disagreed with her, and her family's choice. Motion Tr. Pg. 7, Ln. 5-10. At the conclusion of a care conference held by the Facility, the Facility stated that Mr. Gallagher held the power to involuntarily place Ms. Roush in long term care because the PAD was "activated." Motion Tr. Pg. 7, Ln. 4-9; Def. Answer ¶ 10, 11, 12, 16. On November 13, 2012, Ms. Roush, her daughter Yvonne Olds, and her granddaughter Cynthia Hardy contacted the police to aid in Ms. Roush's release from her confinement at the Facility. Motion Tr. Pg. 7, Ln. 11-22; Affidavit of Scott G. Millard, Exhibit 1.

The Facility still refused to release Ms. Roush after Robert Gallagher told the officers she would be released. Affidavit of Scott G. Millard, attached thereto as Exhibit 1; Motion Tr. Pg. 7, Ln. 10-25.

On November 15, 2012, Ms. Roush consulted with and then retained counsel to aid in her release from her involuntary hospitalization at the Facility. Motion Tr. Pg. 8, Ln. 3-10. Def. Answer ¶ 16. She executed a written revocation of the designation of Robert Gallagher as her patient advocate, had Attorney Millard serve it on the Facility, and then again demanded discharge through her attorney. Motion Tr. Pg. 8-9. Ms. Roush additionally asserted that she was able to make her own decisions regarding medical treatment. Motion Tr. Pg. 9, Ln. 4-9. Ms. Roush's attorney demanded that she be evaluated in the presence of her attorney; however the Facility refused to do anything so Ms. Roush filed a Writ of Habeas Corpus, serving the Facility that same day. Def. Answer ¶ 18, 19, 20.

The Facility had Dr. Seals administer a standardized Mini Mental State Exam (MMSE) that evening without notifying Attorney Millard. Motion Tr. Pg. 9, Ln. 9-18; Def. Answer ¶ 19. Dr. Seals scored Ms. Roush 19-30, falling within the category "borderline." Motion Tr. Pg. 9-10. When the score is correctly scored it was 21-30, falling one point below "normal." MMSE attached hereto as Exhibit 1. Ms. Roush again demanded release during her assessment. *Id.* Dr. Seals mirrored the Facility's expression of disagreement with her personal choice. Motion Tr. Pg 9-10. At no time had Ms. Roush's rights been restricted by court order. Def. Answer ¶ 17.

Despite having received notice of Ms. Roush's revocation, her assertion of regained ability to make medical decisions, and repeated demands for discharge, the Facility disregarded the language within Ms. Roush's PAD, and all applicable provisions of the Estates and Protected Individuals Code Act 386 of 1998, MCL 700.1101, et. seq, in continuing to confine Ms. Roush against her will. Def Answer ¶ 13, Motion Tr. Pg. 9, Ln. 4-9; Def Answer ¶ 16; Roush PAD attached to Pl. Res. Brief as Exhibit D.

On November 16, 2012 The Facility was granted permission to avoid presenting Ms. Roush at her hearing on the Writ of Habeas Corpus. It is unclear how the Facility obtained this permission as counsel was not present for the communication. Motion Tr. Pg. 30, Ln. 1-8. The Facility knew that once out, Ms. Roush could not be forced back to the Facility. The Honorable Suzanne Hoseth-Kreeger found that due to an allegation regarding Ms. Roush's then existing mental health the better place to have the matter heard was before the Probate Court as a result of a guardianship petition filed before the matter was heard on November 16, 2012. Motion Tr. Pg. 30, Ln. 9-14.; Pl. Res. Brief, Exhibit C.

On November 21, 2012 the Facility refused to allow Ms. Roush to leave the facility to attend the Guardianship hearing. Def. Answer ¶ 25. Ms. Roush filed a Motion to Show Cause for the Facility's refusal to allow Ms. Hardy to transport her to the hearing. Def. Answer ¶ 28. The Facility avoided the Show Cause hearing by then producing Ms. Roush at a hearing on Mr. Gallagher's Motion for Appointment of a Temporary Guardian. Judge Simon found no

emergency existed to appoint an emergency guardian. Def. Answer ¶ 30; Affidavit of Scott G. Millard, Guard Tr. Pg. 10, Ln. 7-14, attached thereto as Exhibit 3; In rendering its decision the court noted that Mr. Gallagher believed that Ms. Roush was then of sound mind, but asserted that he and the facility simply disagreed with her desires. Guard Tr. Pg. 7, Ln. 19-24. At the conclusion of the guardianship hearing Ms. Roush reiterated her demand for discharge and refused to return to the Facility on the Facility's transport bus. Affidavit of Keeley D. Heath.

Thereafter, Dr. Seals refused to authorize in home care for Ms. Roush forcing her to obtain a new physician and the Facility then made a report to Adult Protective Service alleging elder abuse as a result of Ms. Roush obtaining her freedom. Def. Answer ¶ 41 and 42. These allegations were not substantiated. In March of 2013, Ms. Roush passed away in her home, surrounded by family, in the manner that she had always made clear to all involved.

COUNTER STATEMENT OF PROCEDURAL HISTORY

Plaintiff-Appellee agrees with Defendant-Appellee's statement of procedural history except that Plaintiff-Appellee did not abandon any claim, as Plaintiff-Appellee responded directly to the basis for the trial court's dismissal in relying on MCL § 700.5508(2) in dismissing all counts raised by the Plaintiff-Appellee. Moreover, Defendant-Appellant failed to raise this argument in any form before the Court of Appeals. Defendant-Appellant's argument defies logic in that the underlying theory for Defendant-Appellant's liability on all counts arises from its claim for False Imprisonment as noted by the Court of Appeals within that Court's opinion wherein it reversed the ruling of the trial court.

STANDARD OF REVIEW

A trial court's grant of summary disposition is reviewed de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* at 120. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co,* 493 Mich 167, 175; 828 NW2d 634 (2013).

LAW AND ARGUMENT

I. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S DISMISSAL OF MS. ROUSH'S CLAIMS BECAUSE MCL 700.5508(2) HAS NO FORCE OR EFFECT ON MS. ROUSH'S CLAIMS; MOREOVER THE FACILITY'S INTERPRETATION OF SAID STATUTE DEFIES THE RULES OF STATUTORY CONSTRUCTION THAT IT RELIES ON AS ITS BASIS FOR SEEKING LEAVE TO APPEAL.

The elements of false imprisonment are '(1) an act committed with the intention of confining another, (2) the act directly or indirectly results in such confinement, and (3) the person confined is conscious of his confinement." *Moore v. Detroit*, 225 Mich App 384, 387; 652 NW2d 688 (2002). The confinement element of false imprisonment involves "an unlawful restraint on a person's liberty or freedom of movement." *Walsh v Taylor*, 263 Mich App 618, 627; 689 NW2d 506 (2004).

Ms. Roush alleged that she was falsely imprisoned by the facility from November 8, 2012 through November 21, 2012. The parties do not dispute that Ms. Roush's liberty or freedom of movement was in fact restricted to the facility. As it's defense, the facility has asserted that it relied on the directions of Robert Gallagher, beginning in October 24, 2012, because the facility had "determined" that Ms. Roush was then unable to participate in making her own medical decisions.

The Defendant-Appellant seems to assert that it is immune from liability for false imprisonment because it claimed that it would "welcome either [the Circuit] Court's or the Probate Court's guidance as to the best interests of Mrs. Roush and the person who is legally authorized to make medical decisions for

Mrs. Roush including a determination that she be discharged from Respondent's facility Against Medical Advice [sic]." *Defendant's Answer to Writ of Habeas Corpus, attached as Defendant-Appellant's Exhibit C.*

One who falsely imprisons another should not be able to avoid liability by asserting that it will follow a court's order to release the imprisoned party.

Contrary to the assertion of Defendant-Appellant, MCL 700.5508(2) does not require a person to go to court to maintain or establish her ability to make basic life decisions. Instead, it allows a patient advocate (or other interested party) to file a petition in the probate court to determine "whether a patient is **unable** to participate in decisions regarding medical treatment." MCL 700.5508(2) (emphasis added). If the legislature had intended to place the burden on the patient, it should have written that a petition could be filed to determine "whether a patient is able to participate in decisions regarding medical treatment."

MCL 700.5508(2) simply provides a means for some interested individual to challenge whether a particular patient is, or is not able to participate in making their own medical decisions. The language of the statute itself does not contemplate any automatic suspension or taking of an individual's rights, rather it simply states that "if" a court determines that the patient is unable to participate in the decisions, the patient advocate's authority, rights, and responsibilities are effective. MCL 700.5508(2). However the statute goes on to explain that, "if" the court determines that the patient is able to participate in the decisions, the patient advocate's authority, rights, and responsibilities are

not effective. *Id.* The point is that the plain language of the statute in no way contemplates any automatic taking of a patient's rights upon the determination of a health care provider that it believes a course of care is better than that which the patient directs.

Moreover, a patient advocate's authority "is exercisable only when the patient is unable to participate in medical or mental health treatment decisions;" MCL 700.5506(3) and automatically suspended when a patient regains those abilities. MCL 700.5509(2). Regardless of whether a patient is, or is not able to participate in making medical decisions, a patient always retains the ability revoke the appointment of a patient advocate. MCL 700.5510(1)(d) and MCL 700.5507(7). The Defendant-Appellant acknowledges that it received a revocation of the patient advocate designation no later than November 15, 2012, but continued to hold Mrs. Roush until November 21, 2012. *Defendant-Appellant's Brief on Application at pp. 3.*

The Court of Appeals found that the affidavits of Scott G. Millard, Keeley D. Heath, and Cynthia Hardy, as well as the various documents attached as exhibits and relied on by both parties, gave rise to the existence of unresolved issues of material fact as to whether Ms. Roush was falsely imprisoned by the facility because there were questions that remained as to whether the facility legally restricted Ms. Roush's of freedom of movement between November 8, 2012 and November 21, 2012.

The analysis of the Court of Appeals throughout its opinion, and as argued by Ms. Roush below is that application of MCL 700.5508(2) to the

undisputed facts of this case does not resolve any of the issues of fact that the Court of Appeals noted in its opinion. Specifically, MCL 700.5508(2) as it is applied to Ms. Roush's claim of False Imprisonment was the sole basis for dismissal and the basis for error as found by the Court of Appeals.

Moreover, the facility's interpretation of MCL 700.5508(2) violates the rule of statutory construction of *in para materia.* "Statutes that relate to the same subject or that share a common purpose are *in para materia* and must be read together as one." *People v Buehler*, 477 Mich 18; 727 NW2d 127, 131 (2007).

The Defendant-Appellant's interpretation of MCL 700.5508(2) would render the provisions and protections of the Guardianship Provisions of EPIC nugatory. *See, e.g.,* MCL 700.5301(4) (allowing an alleged legally incapacitated individual to object to a guardian's appointment); MCL 700.5303(3) (providing counsel to the proposed legally incapacitated individual to contest the proceedings); MCL 700.5304(2) (granting the alleged incapacitated individual a right to an independent examination at state expense, if indigent); MCL 700.5306(1) (limiting appointment of a guardian to those instances where the court finds by clear and convincing evidence that the alleged incapacitated individual is incapacitated and a guardian is necessary to provide continuing care and supervision.)

The Defendant-Appellant's proposed interpretation of MCL 700.5508(2) creates a *de facto* guardianship that is not subject to review and strips the proposed ward of a hearing to balance her fundamental liberty interests

against her need for protection. This interpretation renders the guardianship provisions of EPIC nugatory.

As noted by the Court of Appeals MCL 700.5508(2) simply has no bearing on resolving the various issues of material fact that were found to exist by the various forms of record evidence that currently exist in the present case.

The policy argument raised by the facility regarding a jury hearing evidence of Ms. Roush's false imprisonment is not good public policy. **Specifically, the rule that a healthcare provider need follow is simple: in the absence of a court order to the contrary, where a patient is actively asserting their rights and demanding to be released, that patient should be released.** The only caveat to this rule is already provided by the EPIC, in that a patient may not immediately revoke a patient advocate designation where that patient has placed a restriction on that patient's right to revoke. MCL 700.5515. In fact, the rule sought to be created by the Defendant-Appellant would make for a much more complicated set of circumstances and would create increased exposure to liability to healthcare providers because of their increased involvement in determining whether to disregard a patient's directions and rights. Under the present scheme this authority is placed solely in the discretion of the Probate Court.

II. MS. ROUSH RAISED ALL ARGUMENTS NECESSARY TO THE BASIS OF THE ORDER THAT WAS APPEALED FROM THE TRIAL COURT, THE FACILITY CANNOT RAISE NEW ARGUMENTS FOR THE FIRST TIME IN ITS APPLICATION FOR LEAVE TO APPEAL TO THIS COURT, AND THE FACILITY'S ARGUMENT IGNORES THAT THERE WERE THREE AFFIDAVITS FILED IN OPPOSITION TO THE FACILITY'S MOTION.

The case that the facility cites to in support of its argument that Ms. Roush waived three counts of her complaint relies on a misquotation of the waiver rule expressed in *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). The *Derderian* Court stated that, "[w]hen an appellant fails to dispute the basis of the trial court's ruling, `[t]his Court . . . need not even consider granting [ ] the relief [it] seek[s].'" *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004), quoting *Joerger v Gordon Food Serv, Inc,* 224 Mich App 167, 175; 568 NW2d 365 (1997).

It cannot be disputed that Ms. Roush has challenged every portion of the trial court's opinion from the moment the facility raised its MCL 700.5508(2) argument. Ms. Roush thoroughly briefed every legal basis for why MCL 700.5508(2) did not justify dismissal of her claims. Moreover, all of these arguments were briefed in its Plaintiff's Brief below. This argument is both without merit and not properly raised now that the Defendant-Appellant has lost on appeal.

The facility argues that the Court of Appeals relied on an unsworn, unsigned affidavit in finding that the trial court erred in granting summary

disposition in favor of the facility. This argument simply ignores the fact that there were three affidavits: a signed and notarized affidavit of Keeley D. Heath, an attorney that handled Ms. Roush's temporary guardianship hearing; the sworn affidavit of Cynthia Hardy, Ms. Roush's granddaughter and caretaker within Ms. Roush's home; and the MCR 2.116(H) affidavit filed by Scott G. Millard that not only stated what testimony would be of certain witnesses, it was supported by attachments that corroborated all statements contained therein. Moreover, as an officer of the court and as counsel in the present matter, Mr. Millard's signature signifies that all information contained within that document is premised upon that attorney's honest belief as supported by the facts and circumstances known to the attorney at that time.

Even if the facility's argument were taken as valid, it ignores the other affidavits that were notarized that similarly supported the contentions of those contained within the MCR 2.116(H) affidavit signed by Scott G. Millard. Additionally, the facility purposefully chose to file its Motion for Summary Disposition before Ms. Roush had the fair opportunity to conduct discovery. As such the facility's arguments regarding the provision of admissible evidence at that early juncture is ironically supported by its own conduct. In essence, the argument is without much weight due to the fact that Ms. Roush has not had an opportunity to fully conduct discovery. In either case, the facility admits that it held Ms. Roush against her desire to leave, thus depositions will certainly fully vet the facts necessary to support all claims raised by Ms. Roush.

Of note, this is similar to the analysis of the Court of Appeals that supported its conclusion that the trial court erred in dismissing Ms. Roush's case without affording her the opportunity to fully conduct discovery.

The facility's arguments regarding its failure to raise the issues now raised are noticeably unsupported by any case law. *Haji v. Prevention Ins Agency, Inc*, 198 Mich App 84, 88-90; 492 NW2d 460 (1992) addresses a scenario where the trial judge forced a party to argue a summary disposition issue without affording them the opportunity to fully brief the issue. The Defendant-Appellant had a full and fair opportunity to raise all issues in its brief below. Moreover, Ms. Roush stipulated to an extension of time for the facility to file its brief. The facility had additional time to raise all issues and still failed to do so below.

The Defendant-Appellant has not raised any issue in its Application for Leave to Appeal that demonstrates any reason to disturb the holding of the Court of Appeals. The Court of Appeals, with regard to each count alleged in Plaintiff-Appellee's complaint, reasoned that there were unresolved issues of material facts that remained, that stood a fair chance of being resolved through the discovery process. Defendant-Appellant's motion for summary disposition was premature, as the facts to be fleshed out in the discovery process will ultimately determine whether Plaintiff-Appellee's claims are in fact viable.

Here, there are numerous unresolved factual issues that would ultimately impact whether each count alleged in Plaintiff-Appellee's complaint should be permitted to move toward trial. As noted in the opinion of the Court

of Appeals, some of these factual disputes include (1) whether and when Mr. Gallagher's appointment as patient advocate for Ms. Roush was valid (see p. 3 of COA opinion) (2) whether Ms. Roush was capable of making her own decisions regarding her medical treatment during the relevant time periods (see p. 2-3 of COA opinion) (3) whether Ms. Roush validly revoked Mr. Gallagher's designation as patient advocate on November 15, 2012 (see p. 3 of COA opinion) (4) the actions of the employees of Defendant-Appellant in refusing to treat Ms. Roush following her discharge and in making a report to adult protective services, and whether those actions amounted to extreme and outrageous conduct that was intentional or reckless (see p. 4 of COA opinion) (5) whether Defendant-Appellant had a legal basis for detaining Ms. Roush between November 8, 2012 and November 21, 2012 (see p. 4 of COA opinion) (6) Ms. Roush's known mental status at the time of the filing of the guardianship petition (see p. 4-5 of COA opinion) and (7) whether Defendant-Appellant or one of its employees availed itself of the guardianship procedure for a purpose collateral to the intended use of that procedure, for example, the continued financial benefit of keeping Ms. Roush, a patient paying cash instead of utilizing Medicaid, in their facility (see p. 5 of COA opinion).

Upholding the grant of summary disposition by the circuit court here prevents Plaintiff-Appellee from fully developing the genuine issues of material fact that exist with regard to each count of the complaint in this matter. The decision of the Court of Appeals to permit the unresolved issues of fact to be resolved through the discovery process was the correct one. The unresolved

factual issues noted by the Court of Appeals cannot be resolved without allowing the parties to engage in discovery. The motion for summary disposition under MCR 2.116(C)(10) was premature, and the opinion of the Court of Appeals should be permitted to stand.

CONCLUSION

WHEREFORE, for the forgoing reasons, Plaintiff-Appellee Cynthia Hardy, the personal representative for The Estate of Margaret Marie Roush, respectfully requests that this Court DENY the Defendant-Appellant's Application for Leave to Appeal and DENY Defendant-Appellant's request for peremptory reversal of the Court of Appeals opinion of December 11, 2014.

Respectfully Submitted,
MIEL & CARR, PLC

Dated: February 16, 2015

/s/ Scott G. Millard

Scott G. Millard (P75153)
Attorney for Plaintiff-Appellee

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF MARGARET MARIE ROUSH, by CYNTHIA HARDY, Personal Representative, Plaintiff-Appellant, v THE LAURELS OF CARSON CITY, L.L.C., Defendant-Appellee.	UNPUBLISHED December 11, 2014 No. 317406 Montcalm Circuit Court LC No. 2012-016830-CZ

Before: MARKEY, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) and dismissing the case. We reverse and remand.

This case arises out of Margaret Marie Roush's stay at defendant's facility from October 17 to November 21, 2012. Plaintiff alleged that defendant unlawfully detained Roush at the facility while a determination was pending with regard to Roush's ability to make treatment decisions for herself and that defendant's agents committed various torts while Roush was at the facility and after Roush was discharged from the facility. Plaintiff's complaint alleged false imprisonment, intentional infliction of emotional distress, abuse of process, and civil conspiracy. Before the close of discovery, the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissed all of plaintiff's claims. The trial court relied exclusively on MCL 700.5508(2) and found that because there were competing opinions regarding Roush's ability to make treatment decisions while she was in the facility, the facility complied with its obligations pursuant to MCL 700.5508(2) because the parties sought a determination from a court regarding the issue of Roush's ability to make treatment decisions.

A grant or denial of summary disposition based upon MCR 2.116(C)(10) is reviewed de novo on appeal. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Pursuant to MCR 2.116(C)(10), summary disposition should be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When deciding a motion for summary disposition under MCR 2.116(C)(10), a court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley*, 470 Mich at 278. A genuine issue of material fact exists when the

record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013). Summary disposition pursuant to MCR 2.116(C)(10) is generally premature if granted before discovery on a disputed issue is complete. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

"The elements of false imprisonment are '(1) an act committed with the intention of confining another, (2) the act directly or indirectly results in such confinement, and (3) the person confined is conscious of his confinement.'" *Moore v Detroit*, 252 Mich App 384, 387; 652 NW2d 688 (2002). The confinement element of false imprisonment involves "an unlawful restraint on a person's liberty or freedom of movement." *Walsh v Taylor*, 263 Mich App 618, 627; 689 NW2d 506 (2004).

In the present case, plaintiff alleged that Roush was falsely imprisoned at the facility from November 8 to November 21, 2012, and there is no real dispute that Roush's liberty or freedom of movement was restricted during this time. However, defendant claimed that on October 24, 2012, Robert Gallagher became Roush's patient advocate, and Gallagher directed that Roush not be discharged from the facility. Defendant relied on Gallagher's authority as a patient advocate as a basis for restricting Roush's liberty or freedom of movement between November 8 and November 21, 2012.

A patient advocate's authority "is exercisable only when the patient is unable to participate in medical or mental health treatment decisions." MCL 700.5506(3). Therefore, Gallagher's authority as a patient advocate was properly invoked on October 24, 2012, only if Roush was unable to participate in medical treatment decisions on that date.[1] In contrast, if there was a dispute on October 24, 2012, regarding Roush's ability to participate in medical treatment decisions, the parties could have filed a petition requesting a court's determination as to her abilities. MCL 700.5508(2).

At the time the trial court granted defendant's motion for summary disposition, genuine issues of material fact remained with regard to whether Gallagher was validly appointed as Roush's patient advocate on October 24, 2012, and whether he remained as her patient advocate thereafter. After evaluating Roush's mental status, plaintiff's primary care physician and another physician at the facility determined that Roush was unable to make and communicate medical decisions as of October 24, 2012. However, discovery was not closed at the time of the hearing on defendant's motion for summary disposition, and plaintiff provided the trial court with an affidavit alleging that if deposed, one of these physicians would testify that Roush actually was able to participate in making medical decisions on October 24, 2012. Further, at the time of the hearing on the motion for summary disposition plaintiff had not yet had the opportunity to analyze hundreds of pages of written discovery that could have shed light on Roush's mental capabilities on October 24, 2012. In sum, the issue whether Roush was unable to make decisions

[1] The parties do not allege, and the record does not support a finding, that there is any other date on which Gallagher's authority as a patient advocate could have been properly invoked.

regarding medical treatment on October 24, 2012, was unresolved at the time summary disposition was granted, and this unresolved issue was material to plaintiff's false imprisonment claim.

Moreover, even if Gallagher's powers as a patient advocate were properly invoked on October 24, 2012, to provide a defense to the claim of false imprisonment, Gallagher's authority would have needed to extend through the period of alleged false imprisonment, *i.e.*, would need to extend from November 8 to November 21, 2012.[2] And, at the time of the hearing on the motion for summary disposition, there were unresolved factual questions with regard to whether Gallagher's authority as a patient advocate extended through November 21, 2012. These unresolved issues include when or whether Gallagher's authority as a patient advocate was suspended pursuant to MCL 700.5509(2) based on Roush's regained ability to participate in medical decisions, and whether Roush validly revoked Gallagher's patient advocate designation on November 15, 2012, pursuant to MCL 700.5510(1)(d) and MCL 700.5507(7). All of these unresolved factual issues are material to the false imprisonment claim because the facility's ability to legally restrict Roush's freedom of movement based on directions from her patient advocate necessarily turns on whether and when Gallagher's authority as Roush's patient advocate was valid. Moreover, all of these unresolved issues stood a fair chance of being resolved through discovery. Further, application of MCL 700.5508(2) to the facts of this case does not resolve any of these issues; however, this statute was the only basis on which the trial court relied in dismissing plaintiff's false imprisonment claim. Therefore, the trial court erred in dismissing plaintiff's false imprisonment claim pursuant to MCR 2.116(C)(10) based on MCL 700.5508(2) and before the close of discovery. *Debano-Griffin*, 493 Mich at 175; *Corley*, 470 Mich at 278; *Froling Revocable Living Trust*, 283 Mich App at 292.

Next, the elements of a claim of intentional infliction of emotional distress are: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (citation omitted). With regard to the first element of this tort, "[t]he conduct complained of must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" *Id.* With regard to the second element of this tort, a plaintiff must either show that a defendant specifically intended to cause the plaintiff emotional distress or that the defendant's conduct was so reckless that "any reasonable person would know emotional distress would result." *Lewis v LeGrow*, 258 Mich App 175, 197; 670 NW2d 675 (2003).

In the present case, plaintiff's claims of intentional infliction of emotional distress arise out of the allegations that Roush was illegally detained at the facility from November 8 to November 21, that one of the facility's physicians (who was also Roush's personal physician)

[2] Gallagher's authority as a patient advocate was the only legal basis that defendant pled for detaining Roush from November 8 to November 21, 2012. We do not reach a determination with regard to whether there are other unpled, legal bases for detaining Roush in the facility during this time.

refused to treat Roush after her discharge from the facility, and that an employee of the facility fabricated allegations that resulted in an adult protective services' investigation into the care that Roush received after she was discharged from the facility. As set forth previously, at the time the trial court dismissed plaintiff's claims pursuant to MCR 2.116(C)(10), genuine issues of fact remained with regard to whether the facility had a legal basis for detaining Roush from November 8 to November 21, 2012. Likewise, defendant does not dispute that Roush's physician declined to continue to treat Roush after she was discharged from the facility and that one of its employees made a report to adult protective services regarding Roush's treatment upon her discharge from the facility. Further, plaintiff provided affidavits that, when viewed in the light most favorable to plaintiff, create a genuine issue with regard to the material facts of whether these actions amounted to extreme and outrageous conduct that was intentional or reckless and caused Roush severe emotional distress.

These unresolved issues are material to plaintiff's claim of intentional infliction of emotional distress. *Hayley*, 262 Mich App at 577. Moreover, all of these unresolved issues stood a fair chance of being resolved through discovery. Further, application of MCL 700.5508(2) to the facts of this case does not resolve any of these issues; however, this statute was the only basis on which the trial court relied in dismissing plaintiff's intentional infliction of emotional distress claim. Therefore, the trial court erred in dismissing plaintiff's claim of intentional infliction of emotional distress pursuant to MCR 2.116(C)(10) based on MCL 700.5508(2) and before the close of discovery. *Debano-Griffin*, 493 Mich at 175; *Corley*, 470 Mich at 278; *Froling Revocable Living Trust*, 283 Mich App at 292.

Next, the elements of abuse of process are "(1) an ulterior purpose and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 772; 487 NW2d 807 (1992). "A meritorious claim of abuse of process contemplates a situation where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure." *Dalley v Dykema Gossett*, 287 Mich App 296, 322; 788 NW2d 679 (2010).

In the present case, plaintiff's claims of abuse of process arise out of the allegations that one of defendant's employees improperly helped Gallagher file a petition for guardianship over Roush and that an employee of the facility fabricated allegations of elder abuse after Roush was discharged from the facility, and that these actions were done for the improper purposes of harassing Roush, retaliation against Roush, and financial gain if Roush remained in the facility. The "process" contemplated by the tort of abuse of process is a legal process, not an administrative process. *Friedman v Dozorc*, 412 Mich 1, 30 n 18; 312 NW2d 585 (1981); *Dalley*, 287 Mich App at 322; *Young v Motor City Apartments Ltd*, 133 Mich App 671, 683; 350 NW2d 790 (1984). Therefore, plaintiff's allegation of abuse of process arising out of the elder abuse-reporting process fails as a matter of law. This Court will affirm a trial court's grant of summary disposition if it reaches the correct result, even if for the wrong reason, *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 86; 592 NW2d 112 (1999), and we affirm dismissal of the claim for abuse of process based on this allegation.

However, the guardianship process is a legal process through the probate court. And, at the time the trial court dismissed plaintiff's claim for abuse of process, there was conflicting

evidence in the record regarding Roush's known mental status at the time the petition for guardianship was filed and the extent to which defendant's employees assisted with this filing. In addition, plaintiff provided affidavits that, when viewed in the light most favorable to plaintiff, create a genuine issue with regard to the material fact whether defendant or one of its employees availed itself of the proper guardianship procedure for a purpose collateral to the intended use of that procedure. These unresolved issues are material to plaintiff's remaining allegation of abuse of process. *Dalley*, 287 Mich App at 322. Moreover, these unresolved issues stood a fair chance of being resolved through discovery. Further, application of MCL 700.5508(2) to the facts of this case does not resolve these issues; however, this statute was the only basis on which the trial court relied in dismissing plaintiff's abuse of process claim. Therefore, the trial court erred in dismissing plaintiff's allegations of abuse of process arising out of the guardianship proceedings pursuant to MCR 2.116(C)(10) based on MCL 700.5508(2) and before the close of discovery. *Debano-Griffin*, 493 Mich at 175; *Corley*, 470 Mich at 278; *Froling Revocable Living Trust*, 283 Mich App at 292.

Finally, a civil conspiracy is "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Urbain v Beierling*, 301 Mich App 114, 131; 835 NW2d 455 (2013). In addition, "a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003). If a plaintiff fails to establish the underlying tort, the claim for civil conspiracy must also fail. *Id*. at 384-385.

In the present case, plaintiff's claim of civil conspiracy is based on the underlying alleged torts of false imprisonment, intentional infliction of emotional distress, and abuse of process. If any of the alleged, underlying tortious conduct is established, this conduct would also provide support for the civil conspiracy claim.[3] However, if plaintiff's underlying torts all fail after the close of discovery, plaintiff's civil conspiracy claim also fails. *Advocacy Org for Patients & Providers*, 257 Mich App at 384-385. In sum, there are unresolved factual issues material to plaintiff's claims of false imprisonment, intentional infliction of emotional distress, and abuse of process; these unresolved issues stood a fair chance of being resolved through discovery; and plaintiff's ability to prevail on its claim of civil conspiracy requires it to prevail on at least one of these underlying torts. Further, application of MCL 700.5508(2) to the facts of this case does not resolve the outstanding issues in the underlying torts; however, this statute was the only basis on which the trial court relied in dismissing plaintiff's civil conspiracy claim. Therefore, the trial court erred in dismissing plaintiff's claim of civil conspiracy pursuant to MCR 2.116(C)(10) based on MCL 700.5508(2) and before the close of discovery. *Debano-Griffin*, 493 Mich at 175; *Corley*, 470 Mich at 278; *Froling Revocable Living Trust*, 283 Mich App at 292.

[3] We note that to prevail on its civil conspiracy claim, plaintiff would also be required to establish that Gallagher and someone at the facility, "by some concerted action" conspired to accomplish the tortious conduct. *Urbain*, 301 Mich App at 131.

We note that plaintiff argues that resolution of this appeal turns on statutory interpretation of MCL 700.5508(2). For the reasons stated herein, the statutory interpretation arguments are not dispositive and we decline to address them.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Donald S. Owens